

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

8 KEVIN OLDHAM,)
9 Plaintiff,) Case No. C09-954-BAT
10 v.)
11 MICHAEL J. ASTRUE, Commissioner of the) **ORDER REVERSING AND**
Social Security Administration,) **REMANDING CASE FOR**
12 Defendant.) **FURTHER ADMINISTRATIVE**
) **PROCEEDINGS**

Plaintiff Kevin Oldham seeks review of the denial of his application for disability insurance benefits by the Commissioner of the Social Security Administration, after a hearing before an administrative law judge (“ALJ”). Dkt. 1. For the reasons below, the Court orders the Commissioner’s decision be **REVERSED** and **REMANDED** for further administrative proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiff is 40 years old, has an 11th grade education, and received special education during his entire school career. Tr. 138, 207. His past work experience includes stocker, dishwasher, pricer, cook, construction worker, and dishwasher. Tr. 150. On August 3, 2006, he applied for disability insurance benefits alleging disability as of April 15, 2005. Tr. 8, 129. His

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1 application was denied initially and on reconsideration. *Id.* After a hearing conducted on
2 January 6, 2009, the ALJ issued a decision finding plaintiff not disabled. Tr. 5-22.

3 Applying the five-step sequential evaluation process¹ for determining whether a claimant
4 is disabled, the ALJ found at step one that plaintiff had not engaged in substantial gainful activity
5 since the alleged onset date of April 15, 2005. Tr. 10.

6 At step two, the ALJ found plaintiff had the following severe impairments: bipolar
7 disorder, sleep disorder, and early osteoarthritis. *Id.*

8 At step three, the ALJ found plaintiff's impairments did not met or equal the
9 requirements of a listed impairments under 20 C.F.R. Part 404, Subpart P, Appendix 1. Tr. 12.

10 The ALJ found that through the date last insured, plaintiff had the residual functional
11 capacity ("RFC") to perform:

12 sedentary work as defined in 20 CFR 404.1567(a), including the
13 ability to lift and/or carry 10 pounds occasionally and less than 10
14 pounds frequently, to stand and/or walk for a total of about six
15 hours in an eight-hour day. The claimant has the mental residual
16 functional capacity to adequately perform the mental activities
17 generally required by competitive, remunerative work as follows:
18 to understand, remember, and carry out simple instructions; the
19 average ability to perform sustained work activities (i.e. can
20 maintain attention and concentration, persistence and pace) in an
21 ordinary work setting on a regular and continuing basis (i.e. eight
22 hours a day, for five days a week, or an equivalent work schedule)
23 within customary tolerances of employers' rules regarding sick
leave and absence. The claimant can make judgments
commensurate with the functions of work, i.e., simple work-related
decisions; respond appropriately to supervision, co-workers, and
work situations; and deal with changes all within a routine work
setting. The claimant can perform work that does not require
dealing with the general public as in waiting on customers in a
sales position; incidental contact with the general public is not
precluded so long as it is not an essential element of the work
process.

¹ See 20 C.F.R. §§ 404.1520, 416.920.

1 Tr. 13-14.

2 At step four, the ALJ found plaintiff could not perform past relevant work. Tr. 21.
3 At step five, the ALJ found plaintiff could work as an “assembler,” a job that exists in significant
4 numbers in the national economy and that plaintiff was therefore not disabled. Tr. 21-22. The
5 Appeals Council denied review of the ALJ’s decision, making it the Commissioner’s final
6 decision under 42 U.S.C. § 405(g). Tr. 1-4.

7 **II. STANDARD OF REVIEW**

8 The Court may set aside the Commissioner’s denial of disability benefits when the ALJ’s
9 findings are based on legal error or not supported by substantial evidence. 42 U.S.C. § 405(g);
10 *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). The ALJ determines credibility and
11 resolves conflicts and ambiguities in the evidence. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
12 Cir. 1995). The Court may neither reweigh the evidence nor substitute its judgment for that of
13 the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence
14 is susceptible to more than one rational interpretation, it is the Commissioner’s conclusion that
15 must be upheld. *Id.*

16 **III. DISCUSSION**

17 **A. Plaintiff’s ability to follow simple instructions**

18 Examining psychologist Lisa Cowden, Ph.D. opined plaintiff is unable to follow simple
19 instructions. Tr. 206-209. In general, more weight should be given to the opinion of a treating
20 source than to a non-treating source, and more weight to the opinion of an examining source than
21 to a non-examining source. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not
22 contradicted by another physician, a treating or examining physician’s opinion may be rejected
23 only for “clear and convincing reasons.” *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396

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1 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may not be
2 rejected without "specific and legitimate reasons' supported by substantial evidence in the
3 record for doing so." *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir.
4 1983)).

5 Plaintiff contends the ALJ failed to provide specific and legitimate reasons to reject Dr.
6 Cowdin's opinion. Dkt. 11 at 5. The Court disagrees. First, Dr. Cowden opined plaintiff "was
7 not able to follow simple instructions" based on her observation that he "was unable to follow
8 simple three-step directions. He was asked to take a paper in his right hand, fold it in half and
9 place it on the floor, and he took the paper in his left hand, folded it and placed it on the floor."
10 Tr. 206. The ALJ, however, did not find plaintiff could perform three step instructions. Rather,
11 he found "State agency psychologist consultants reviewed the record and found that the claimant
12 was able to understand, recall, and execute short and simple instructions, such as **one and two**
13 **step** instructions." Tr. 19 (emphasis added).

14 Second, the ALJ's finding is supported by substantial evidence in the record. Dr.
15 Cowden's opinion is premised on the inability to perform three step instructions; she did not find
16 plaintiff was unable to follow one or two step instructions. This is consistent with the opinions
17 of examining doctors Dr. William Wilkenson, Ed.D. and Dr. Shawn Kenderline, Ph.D. who
18 found that while plaintiff has some impairment in following three step instructions, he has no
19 impairment in following simple one to two step instructions. Tr. 313, 320. Dr. Renee
20 Eisenhauer Ph.D. also opined plaintiff "is able to follow at least one or 2 step instructions." Tr.
21 213.

22 Third, the job the vocational expert opined plaintiff could perform does not require the
23 ability to perform three step instructions. The vocational expert testified plaintiff could perform

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1 work as an assembler under DOT 713.687-018. This is a position that requires the ability to
2 "carry out simple one–two step instructions, not three-step instructions. *Id. see also* Dictionary
3 of Occupational Titles (4th Ed., Rev. 1991), Appendix C.

4 Accordingly, the Court finds substantial evidence² supports the ALJ's finding that
5 plaintiff has the ability to follow simple one or two step instructions.

6 **B. Plaintiff's Global Assessment Score ("GAF") and residual functional capacity**

7 Dr. Cowden assigned plaintiff a GAF score of 50, indicating he has serious symptoms or
8 serious impairments in social, occupational or school functioning³. Tr. 208. Plaintiff argues the
9 ALJ erred in finding plaintiff functions at higher than GAF score 50. Dkt. 11 at 10. Essentially,
10 this argues the ALJ's residual functional capacity assessment erroneously fails to account for all
11 of plaintiff's limitations.

12 The Commissioner argues the ALJ did not err as Dr. Wilkerson assigned plaintiff a GAF
13 score of 55, indicating moderate problems and limitations. Dkt. 13 at 4. Whether plaintiff
14 functions at GAF 50 or 55 does not resolve whether he is able to work. A GAF score does not
15 have a direct correlation to the severity requirements of the Social Security mental disorder
16 listings; 66 Fed.Reg. 50764-5 (2000). A GAF score of 50, if credited, would not require a
17 finding of disability. Likewise, a GAF score of 55 does not mean plaintiff is able to perform any

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19 ² The Court agrees with plaintiff that the ALJ erred in equating activities such as cooking, using
20 the computer and playing video games with the ability to follow simple instructions. Dkt. 11 at
21 7-8. The record does not establish these activities involve following instructions, or that if they
22 do, what type of instructions. Accordingly, the Court concludes these activities are not specific
23 and legitimate reasons to reject Dr. Cowden's opinion that plaintiff cannot follow simple
instructions. However, because the ALJ did provide a specific and legitimate reason to reject Dr.
Cowden's opinion, the Court finds that this error was harmless. *See Stout v. Comm'r, Soc. Sec.
Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

³ *American Psychiatric Ass'n. Diagnostic and Statistical Manual of Mental
Disorder*, 34 (Text Rev., 4th Ed. 2000).

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1 work without limitations.

2 As noted above, plaintiff's GAF score argument essentially boils down to whether the
3 ALJ erred by failing to incorporate all of plaintiff's limitations into the residual functional
4 capacity assessment. In pertinent part, the ALJ found plaintiff has the RFC to:

5 adequately perform the mental activities generally required by
6 competitive, remunerative work as follows: to understand, remember,
7 and carry out simple instructions; the average ability to perform
8 sustained work activities (i.e. can maintain attention and concentration,
9 persistence and pace) in an ordinary work setting on a regular and
10 continuing basis (i.e. eight hours a day, for five days a week, or an
equivalent work schedule) within customary tolerances of employers'
rules regarding sick leave and absence. The claimant can make
judgments commensurate with the functions of work, i.e., simple work-
related decisions; respond appropriately to supervision, co-workers, and
work situations; and deal with changes all within a routine work setting.

11 Tr. 13.

12 This finding is not supported by substantial evidence. Dr. Cowden who scored plaintiff at
13 GAF 50 opined “[h]e may be able to adapt to a work environment which involves limited contact
14 with coworkers.” Tr. 209. Dr. Kenderline opined plaintiff had marked limitations in the ability to
15 1) relate appropriately with co-workers and supervisors, and 2) respond appropriately to and
16 tolerate the pressure and expectations of a normal work setting. Tr. 313. Dr. Wilkerson opined
17 plaintiff has “moderate+” limitations in the ability to relate appropriately with co-workers and
18 supervisors, and respond appropriately to and tolerate the pressure and expectations of a normal
19 work setting. Tr. 320.

20 Dr. Eisenhauer opined plaintiff had moderate limitations in his ability to 1) maintain
21 attention and concentration for extended periods; 2) perform activities within a schedule, maintain
22 regular attendance, and be punctual within customary tolerances; 3) complete a normal workday
23 and workweek without interruptions from psychologically based symptoms and to perform at a

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1 consistent pace without an unreasonable number and length of rest periods; 4) accept instructions
2 and respond appropriately to criticism from supervisors; 5) get along with coworkers or peers
3 without distracting them or exhibiting behavioral extremes; 6) maintain socially appropriate
4 behavior and to adhere to basic standards of neatness and cleanliness; and 7) respond
5 appropriately to changes in the workplace. Tr. 211-213. Dr. Eisenhauer also stated plaintiff
6 "reports that he is irritable and that he gets angry with people and is uncomfortable in crowds.
7 Due to this, it is better that the claimant does not work closely with the public, coworkers, or
8 supervisors." Tr. 214.

9 The ALJ's RFC assessment ignores these limitations and instead concludes plaintiff could
10 "perform sustained work activities (i.e. can maintain attention and concentration, persistence and
11 pace) in an ordinary work setting on a regular and continuing basis (i.e. eight hours a day, for five
12 days a week, or an equivalent work schedule) within customary tolerances of employers' rules
13 regarding sick leave and absence . . . The claimant can make judgments commensurate with the
14 functions of work, i.e., simple work-related decisions; respond appropriately to supervision, co-
15 workers, and work situations; and deal with changes all within a routine work setting." Tr. 13.

16 The ALJ's failure to include these limitations in plaintiff's RFC is not harmless. Indeed,
17 the vocational expert's opinion that plaintiff has the RFC to perform work as an assembler is
18 premised on a hypothetical that did not include any of the limitations noted by Dr. Cowden, Dr.
19 Eisenhauer, Dr. Kenderline, or Dr. Wilkerson except for the limitation that plaintiff not work
20 directly with the public. Tr. 51-52.

21 An ALJ posing a hypothetical question to a vocational expert "must set out all the
22 limitations and restrictions of a particular claimant." *Magallanes v. Bowen*, 881 F.2d 747, 756
23 (9th Cir. 1989). An ALJ "need not include all claimed impairments in his hypotheticals [but] he

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1 must make specific findings explaining his rationale for disbelieving any of the claimant's
2 subjective complaints not included in his hypothetical." *Ilight v. Social Sec. Admin.*, 119 F.3d
3 789, 793 (9th Cir. 1997). If the assumptions in the hypothetical are not supported by the record,
4 or do not reflect all of the claimant's limitations, the opinion of the vocational expert that claimant
5 has a residual functional capacity has no evidentiary value. *Gallant v. Heckler*, 753 F.2d 1450,
6 1456 (9th Cir. 1984); *Matthews v. Shalala*, 10 F.3d 678, 681 (9th Cir. 1993).

7 Here, vocational expert Leda Brookshire testified at the hearing before the ALJ. Tr. 23.
8 She opined plaintiff could work as an "assembler" based on a hypothetical that did not include all
9 of the limitations noted above. Tr. 52-53. When the vocational expert was asked whether her
10 opinion would change if the hypothetical person had "markedly below average ability to sustain
11 work activities . . . would sporadically miss work as frequently as four to eight hours in a 40-hour
12 work week . . . would that prevent competitive employment in the jobs you've identified," she
13 answered, "yes sir it would . . . this would far exceed the tolerance for absenteeism." Tr. 53.

14 Accordingly, the Court concludes the ALJ erred in failing to include without explanation,
15 in his RFC determination the limitations set forth by the medical sources above. The Court also
16 concludes the ALJ erred in concluding plaintiff could perform as an assembler because that
17 conclusion was based on a hypothetical that did not include all of plaintiff's limitations.

18 **D. Lay Witness Francis Oldham**

19 Ms. Oldham is plaintiff's mother. Plaintiff argues the ALJ erred in finding her statement
20 not "probative evidence regarding claimant's functional limitations." Dkt. 14 at 5; Tr. 20. Lay
21 testimony as to a claimant's symptoms is competent evidence that the ALJ must take into
22 account, unless the ALJ expressly determines to disregard such testimony and gives specific
23 reasons germane to each witness for doing so. *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001).

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1 The record supports the ALJ's findings. In her "function report adult - third party," Ms. Oldham
2 noted she was not sure if plaintiff could "pay attention," does "ok" on following instructions,
3 does not do well getting along with bosses, was not sure whether plaintiff had been fired because
4 of problems getting along with others, and did not handle stress well. Tr. 163-64. She also
5 reported he could "fly off the handle" and that the "littlest things can set him off" but these
6 comments were not made in connection with the workplace. Tr. 168. Accordingly the Court
7 finds the ALJ's assessment of the witness is supported and that the Court cannot reweigh the
8 evidence nor substitute its judgment for that of the Commissioner.

9 **E. Lay witness Lorene Thody**

10 The Commissioner concedes the ALJ erred in failing to comment on the evidence
11 presented by Ms. Thody, plaintiff's girlfriend. Dkt. 13 at 11. The Commissioner contends this
12 error is harmless. *Id.* The Court disagrees. As the ALJ on remand must consider all relevant
13 evidence in assessing plaintiff's RFC, the ALJ should consider Ms. Thody's evidence.

14 **V. CONCLUSION**

15 For the foregoing reasons, the Court orders that this case be **REVERSED** and
16 **REMANDED**. On remand, the ALJ should include in his RFC assessment the limitations set
17 forth by the medical sources noted above. If the ALJ does not accept the medical sources'
18 opinions that plaintiff has functional limitations regarding relating appropriately with co-
19 workers and supervisors; responding appropriately to and tolerate the pressure and expectations
20 of a normal work setting; working within a schedule, maintaining regular attendance, and being
21 punctual within customary tolerances; completing a normal workday and workweek; performing
22 at a consistent pace without an unreasonable number and length of rest periods; accepting
23 instructions and responding appropriately to criticism from supervisors; getting along with

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1 coworkers or peers without distracting them or exhibiting behavioral extremes; and maintaining
2 socially appropriate behavior and to adhere to basic standards of neatness and cleanliness, the
3 ALJ must explain that decision and identify the evidence he relies on to do so. The ALJ should
4 also consider Ms. Thody's evidence. And the ALJ should obtain additional vocational testimony
5 to determine whether there are any jobs that plaintiff can perform in view of all of his limitations
6 and, if not, whether there exists in significant numbers in the national economy a job that
7 plaintiff can perform.

8 DATED this 17th day February, 2010.

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11 BRIAN A. TSUCHIDA
12 United States Magistrate Judge
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